No. 17-1229

In the
Supreme Court of the United States

HELSINN HEALTHCARE S.A.,

Petitioner,

v.

TEVA PHARMACEUTICALS USA, INC., et al.,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Federal Circuit

BRIEF FOR *AMICUS CURIAE* CONGRESSWOMAN ZOE LOFGREN IN SUPPORT OF RESPONDENTS

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STATEMENT OF INTEREST[1]

Congresswoman Zoe Lofgren represents the 19th Congressional District of California, based in San Jose, California—the heart of Silicon Valley. Rep. Lofgren has a special interest and expertise in intellectual property law, which has often been a focus of her work in Congress. Specific to the question this case presents, Rep. Lofgren was actively involved in the drafting and passage of the 2011 America Invents Act ("AIA") through her work on the House Committee on the Judiciary ("Committee"). She proposed the amendment containing the language retaining the "on-sale bar" at issue in this case, which the Committee adopted and which ultimately became law with the enactment of the AIA. Because of her work championing this amendment against its opponents in Congress, Rep. Lofgren is uniquely well-suited to speak about the AIA's retention of the on-sale bar, including the Committee's work drafting the amendment and the significance of contemporaneous statements from other members of Congress about the specific language adopted in the Act.

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[1] Pursuant to Supreme Court Rule 37.6, *amicus curiae* states that no counsel for any party authored this brief in whole or in part and that no entity or person, aside from *amicus curiae*, its members, and its counsel, made any monetary contribution toward the preparation or submission of this brief. Pursuant to Supreme Court Rule 37.3, counsel of record for all parties consented to the filing of this brief.

SUMMARY OF THE ARGUMENT

When Congress retained the phrase "on sale" without alteration in the Leahy-Smith America Invents Act of 2011 ("AIA"), Congress clearly intended to preserve the meaning of the on-sale bar as it had long been judicially interpreted, including in many of this Court's own cases. All of the ordinary tools of statutory interpretation point to that result, including the plain language of the on-sale bar and established canons of statutory construction.

The legislative history surrounding the AIA does not undermine this result—it supports it. Congress considered several alternative bills to the AIA that would have achieved the result for which Petitioner now advocates: replacing the on-sale bar with a pure publicity standard. Yet Congress did not adopt the language of those proposals and chose instead to preserve the on-sale bar as it had previously existed. Both advocates and opponents of the on-sale bar contemporaneously acknowledged that retaining the bar also meant retaining its judicially-defined meaning. It was only *after* opponents of the on-sale bar lost their bid to change the AIA's text that individual members of Congress delivered floor statements (notoriously the least reliable form of legislative history) pressing a creative interpretation of the AIA's ultimately-enacted language that would accomplish the very thing Congress had *declined* to do.

Petitioner's legislative history arguments rely on these isolated floor statements, ignoring the overall weight of legislative history and the traditional canons of statutory construction, all of which strongly favor Respondent's position in this case.

ARGUMENT

I. Under The Plain Text Of The America Invents Act, An Invention Is "On Sale" When It Is Offered For Sale.

The words "on sale" in the AIA should be afforded their plain meaning: an invention is "on sale" when it is offered for sale. As Respondents have demonstrated (and as will only be briefly summarized here), whether an item is "on sale" depends on whether it is available for purchase, not on whether any purchase is publicly disclosed. Not only does that reading comport with a commonsense understanding of what "on sale" means, but it is also consistent with what courts rightly assume when Congress retains words previously present in a statute—that when Congress reuses the same language, it intends the same meaning. *See Air Wis. Airlines Corp. v. Hoeper*, 571 U.S. 237, 248 (2014). Here, when Congress enacted the AIA, the term "on sale" had a judicially-established meaning. By continuing to use "on sale" in the AIA, Congress clearly intended to preserve that judicially-established meaning. Congress's addition of the words "or otherwise available to the public" does not change matters. That language *broadens* the range of conduct that invalidates a patent, so it makes no sense to use that language to *constrict* the application of the on-sale bar, as Petitioner would have this Court do. The Court should honor the meaning of the AIA's plain text by maintaining the definition of "on sale" that Congress chose to preserve.

A. As Case Law Made Clear at the Time of the AIA, Whether an Item Is "On Sale" Depends on Its Availability for Purchase, Not Public Disclosure.

The phrase "on sale," by its plain terms, speaks only to the availability of something for purchase, not the public or private nature of any exchange. As Respondent has demonstrated, Resp. Br. 23-24, and as dictionary definitions confirm, a "sale" simply refers to a "transfer of property for money or credit," *Random House Webster's Unabridged Dictionary* 1693 (2d ed. 2001). The focus is on *ownership*, not *disclosure*. Something is "on sale" merely because it is made available for purchase, regardless of whether that availability is extended to all members of the public or only a private group.

When Congress passed the AIA, this Court had long interpreted the phrase "on sale" consistently with its plain language, to cover *any* offer of sale, regardless of whether the offer would disclose the invention to the public. In *Hall v. Macneale*, 107 U.S. 90, 97 (1883), the sale of two safes containing unpatented bolts was enough to trigger the on-sale bar, even though there were only two safes sold and the bolts could be accessed only by destroying the safes. In *Consolidated Fruit-Jar Co. v. Wright*, 94 U.S. 92, 94 (1876), the Court held that "a single instance of sale or of use by the patentee may ... be fatal to the patent," again not requiring that the sale have the effect of disclosing the invention broadly to the public. In *Smith & Griggs Manufacturing Co. v. Sprague*, 123 U.S. 249, 257 (1887), the Court said that "[a] single sale to another ... would certainly ... defeat[ ] [an inventor's]

right to a patent," again without considering whether such a "single sale" would disclose the invention to the public at large.

Though old, these cases are hardly relics, as their holdings have continued to be applied in more recent decisions. In *Pfaff v. Wells Electronics, Inc.*, 525 U.S. 55, 67 (1998), for example, an inventor's mere *offer* of an unpatented invention to a single purchaser was enough to trigger the on-sale bar, even though an offer of sale would not, in and of itself, disclose the details of the invention to be sold.

B. Courts Rightly Assume That Congress Intends to Preserve the Meaning of Judicially-Interpreted Terms When It Retains Them in a Statute.

Congress was aware of this Court's longstanding interpretation of the on-sale bar when it chose to retain it in the AIA. Under well-established case law, courts, thus, rightly assume Congress intended to preserve that meaning.

Before the AIA's enactment, 35 U.S.C. § 102 (2006) provided that "[a] person shall be entitled to a patent unless ... the invention was ... on sale in this country[ ] more than one year prior to the date of the application for patent in the United States." Although Congress changed *other* language in this statutory section when it passed the AIA, Congress chose not to disturb the statute's pre-existing use of the phrase "on sale." Thus, after the AIA, 35 U.S.C. § 102 provides that "[a] person shall be entitled to a patent unless ... the claimed invention was ... on sale ... before the effective filing date of the claimed

invention." AIA, Pub. L. No. 112-29, § 3(b)(1), 125 Stat. 284, 285-286 (2011).

When Congress chooses to retain a term of art in a statute, as it did in retaining "on sale" in § 102, courts rightly assume that the choice is purposeful and embraces the existing meaning of the retained term. "It is a cardinal rule of statutory construction that, when Congress employs a term of art, it presumably knows and adopts the cluster of ideas that were attached to each borrowed word in the body of learning from which it is taken." *Air Wis.*, 571 U.S. at 248.

This principle holds true especially where this Court has already interpreted the term in question. "[T]he modification by implication of the settled construction" of a statute "is not favored." *United States v. Madigan*, 300 U.S. 500, 506 (1937). Rather, when Congress intends to change the meaning of a term that this Court has interpreted, "it ordinarily provides a relatively clear indication of its intent in the text of the amended provision." *TC Heartland LLC v. Kraft Foods Grp. Brands LLC*, 137 S. Ct. 1514, 1520 (2017). *See also* Antonin Scalia & Bryan Garner, *Reading Law: The Interpretation of Legal Texts* 331 (2012) ("Legislative revision of law clearly established by judicial opinion ought to be by express language or unavoidably implied contradiction. We know of no case to the contrary.")

In enacting the AIA. Congress made no clear effort to change the meaning of "on sale." Quite the opposite: Congress did not change the phrase "on sale" *at all*. Congress simply preserved that judicially-interpreted term of art in 35 U.S.C. § 102 without

changing the text or specifying an alternative meaning or new limitation.

Accordingly, a well-established canon of statutory construction counsels this Court to retain its longstanding interpretation of "on sale" in 35 U.S.C. § 102 just as Congress chose to retain those words despite changing other parts of the same statute. Applying this canon serves the additional purpose of allowing Congress to predict the way that courts will interpret the statutory language it enacts. Congress is entitled to legislate against the backdrop of well-recognized judicial canons, as it has done here. *See EEOC v. Arabian Am. Oil Co.*, 499 U.S. 244, 248 (1991) (Court assumed that "Congress legislates against the backdrop of" the well-recognized presumption against the extraterritorial application of statutes). Consistent application of these background interpretive principles lends predictability to statutory drafting and clarity to subsequent judicial interpretation.

C. Congress Added the Phrase "Or Otherwise Available to the Public" to Broaden the Range of Conduct That Could Invalidate a Patent, Not to Restrict It.

To counter the foregoing analysis, Petitioner hangs its hat not on changes Congress made to the "on sale" language (there were none) but on other changes Congress made to the statutory text nearby. Specifically, Congress added the phrase "or otherwise available to the public" to the list of patent-invalidating actions in 35 U.S.C. § 102—the same list that contains the on-sale bar. Thus, the post-AIA

version of § 102 reads: "A person shall be entitled to a patent unless ... the claimed invention was patented, described in a printed publication, or in public use, on sale, or otherwise available to the public before the effective filing date of the claimed invention." Petitioner reads the "or otherwise" addition to this language as modifying the meaning of the list of established terms of art that precede it. Not so.

First, reading "or otherwise available to the public" to modify the list of established terms preceding it would be inconsistent with the canon of statutory interpretation that applies when determining whether Congress has changed the meaning of a term this Court has previously defined. *Supra*, at 5-7. As explained, this Court expects that Congress will "provide[ ] a relatively clear indication of its intent" to change a statute's meaning and disfavors "modification by implication." *TC Heartland*, 137 S. Ct. at 1520 (quoting in part *Madigan*, 300 U.S. at 506). Yet "modification by implication" is precisely what Petitioner thinks Congress did. Petitioner would have this Court *imply* from the addition of the "or otherwise" language that Congress intended to modify the meaning of *every* judicially-interpreted term of art preceding it, essentially a clandestine way of making sweeping changes to existing caselaw. That is flatly inconsistent with how this Court expects Congress to act when it legislates around its precedential decisions.

Second, Petitioner's reading of "or otherwise available to the public" would *contract* the scope of the on-sale bar when that language naturally operates to

expand the categories of patent-invalidating acts. The AIA's addition of "or otherwise available to the public," most naturally (and indeed, obviously) acts as a new, catch-all category encompassing *any* act that makes an unpatented invention available to the public, whether or not that act would otherwise be captured by one of the preceding categories. *See* Resp. Br. at 19, 31-33. The word "otherwise" specifically acknowledges that the preceding categories *sometimes* overlap with the new, catchall category, but it nonetheless allows the catchall category to serve as a statutory gap-filler, ensuring that no act of public sharing escapes inclusion in the list of patent-invalidating acts. Petitioner's interpretation, however, would read the "otherwise" category to *restrict* the applicability of the on-sale bar even as it simultaneously expands the list of patent-invalidating acts as a gap-filler. In other words, Petitioner would read "or otherwise available to the public" to contract the scope of the on-sale bar to only public sales while expanding the list of patent-invalidating acts to include any and all acts that make an unpatented invention publicly available. That reading is unnatural, exceptionally complicated, and frankly, makes little sense.

Third, Petitioner's reading would radically alter the purpose of the on-sale bar (and here again, without any acknowledgment from Congress that it was enacting such a change). The on-sale bar exists to encourage the public disclosure of inventions by discouraging inventors from profiting from their inventions for long periods of time before seeking the benefit of the monopoly granted by patent ownership. This Court's decisions have embraced this policy

rationale. When interpreting the on-sale bar, *see supra* 4-5, the Court has consistently looked not to whether a sale *actually disclosed* an invention to the public (as Petitioner urges the Court to do now) but to whether an inventor *derived a benefit* from the sale of the unpatented invention. *See, e.g.*, *Consol. Fruit-Jar*, 94 U.S. at 94. The policy objective behind the on-sale bar drives this distinction. The on-sale bar allows an inventor the advantage of a patent's temporary monopoly *only* upon prompt disclosure of the patented invention. Enforcing the on-sale bar avoids the problem of "an inventor acquir[ing] undue advantage over the public by delaying to take out a patent" while nonetheless attempting to profit from the invention, thereby "preserv[ing] the monopoly to himself for a longer period than is allowed by the policy of the law." *Pfaff*, 525 U.S. at 64-65 (quoting *City of Elizabeth v. Am. Nicholson Pavement Co.*, 97 U.S. 126, 137 (1877)). For that reason, the on-sale bar has not historically been concerned with the public's access to the details of an invention but rather with an inventor benefitting from an undisclosed invention *and later* receiving the benefit of a patent's monopoly, too. Petitioner would upend this established policy justification for the on-sale bar and replace it with a publicity rationale, all without any clear language from Congress indicating such a momentous change.

II. The Legislative History Surrounding The America Invents Act Does Not Justify Reading "On Sale" Inconsistently With Its Plain Meaning.

The AIA's legislative history provides no justification for departing from the plain language of

the on-sale bar and the ordinary canons of statutory construction outlined above. No one understands the legislative history behind reenacting the on-sale bar better than Rep. Lofgren, who championed retaining the "on sale" language that ultimately remained in the AIA against vocal opposition in Congress. The legislative history reveals that Congress considered making changes to the on-sale bar when it enacted the AIA but *rejected* those proposals. Contrary statements in the Congressional Record reflect the views of individuals, not the intent of Congress.

A. Congress Explicitly Rejected Versions of the AIA That Would Have Removed or Modified the On-Sale Bar.

During the years leading up to the AIA's passage, members of Congress proposed alternative bills that would have replaced the on-sale bar with a publicity-based standard. In 2005, Representative Lamar Smith introduced the Patent Reform Act of 2005, which would have removed the on-sale bar entirely, invalidating patents only where "the claimed invention was patented, described in a printed publication, *or otherwise publicly known*." H.R. 2795, 109th Cong. (2005) (emphasis added). Senator Orrin Hatch introduced the same language in the Senate the following year. S. 3818, 109th Cong. (2006). In both 2008 and 2009, Senator Jon Kyl introduced bills that used different language to accomplish the same objective: replacing the on-sale bar with a publicity standard. These bills prohibited granting a patent where "the claimed invention was patented, described in a printed publication, or otherwise made available to the public (other than through testing undertaken

to reduce the invention to practice)." S. 3600, 110th Cong. (2008); S. 610, 111th Cong. (2009).

Moreover, advocates for these bills recognized that the changes they proposed would significantly modify existing law in order to create the result Petitioner advocates today. In a 2008 floor statement advocating for the passage of S. 3600, the Patent Reform Act of 2008, Senator Kyl described his bill as proposing "significant changes" through "amend[ing] the novelty condition of patentability by eliminating public use and the on-sale bar as independent bases of invalidity and instead impos[ing] a uniform test of whether art has been made available to the public." 154 Cong. Rec. 22,631 (2008). Senator Kyl described this "significant change" as "eliminating confidential sales and other secret activities as grounds for invalidity"—just what Petitioner now seeks.

Congress knew, then, that swapping the on-sale bar for a publicity standard was a potential patent reform, and Congress was aware of concrete proposals that would have enacted just such a sweeping change. Yet Congress *did not adopt* these proposals. Rather, "Congress several times considered, but rejected, the very changes to the on-sale bar [Petitioner] urges ... were actually made." Pet. App. 12a (O'Malley, J., concurring).

B. Instead, Congress Enacted Language Preserving the On-Sale Bar and Its Pre-Existing Meaning.

Instead of adopting language that would have replaced the on-sale bar with a publicity-based standard, Congress preserved the on-sale bar in the AIA by using the same "on sale" language already in

the U.S. Code and interpreted by this Court, which all sides recognized would preserve that term's pre-existing meaning.

Whether to preserve the on-sale bar was an openly contested issue during the debates leading up to the AIA's passage. During the House Committee on the Judiciary's consideration of the draft AIA, Rep. Lofgren proposed an amendment to remove the portions of an amendment from Rep. Smith that would have stricken the on-sale bar from the bill. Rep. Lofgren explained her opposition to the amendment this way:

> I have now heard strenuous concerns about the broader change from a wide range of stakeholders. In particular, they are concerned about the deletion of specific categories of prior art with well established meanings in case law and replacing those terms with a more ambiguous term ["]otherwise disclosed to the public["].

House Comm. on the Judiciary, *Markup of H.R. 1249, The America Invents Act* 101 (Apr. 14, 2011) ("*Markup*") (statement of Rep. Lofgren). Rep. Lofgren made clear that Rep. Smith's original proposal would have "up-end[ed] 100 years of patent law" by changing the definition of what actions can invalidate a patent (but that are nonetheless protected by the one-year grace period in section 102(b)). Simply put, Rep. Lofgren offered her amendment to retain not only the *words* "on sale," but also the *meaning* associated with those words, as they had been interpreted by this Court and the lower courts—indeed, that was the entire point of her amendment. Following her

statement, Rep. Smith announced his support for Rep. Lofgren's amendment and encouraged his colleagues to join him. *Markup* 102 (statement of Rep. Smith). Rep. Lofgren's amendment passed, thus blocking the attempt to remove the on-sale bar from the bill in Committee.[2]

This Committee proceeding demonstrates not only that the decision to include the on-sale bar in the AIA was a considered choice in Congress, but also that the stated rationale for preserving it was to maintain the meaning of a term well-established in the case law. Other contemporaneous statements from Senator Kyl demonstrate that he, too, believed that the language ultimately enacted in the AIA would have the effect of preserving the on-sale bar's existing meaning. In his minority statement in the Senate Committee on the Judiciary's report on the AIA bill, Senator Kyl urged the Senate to consider amending the bill "to remove subjective elements from patent law," including "patent-forfeiture provisions that apply only to non-public prior art." S. Rep. 111-18, at 60 (2009).

In short, all sides understood that whether to include the on-sale bar in the AIA was a live issue and that retaining the on-sale bar meant retaining its present meaning.

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[2] When the AIA ultimately reached a floor vote, Rep. Lofgren voted against it for reasons relating to other provisions not at issue in this appeal. That is irrelevant for tracing the progress of the bill through Committee or assessing the effect of the amendment Rep. Lofgren sponsored—which ultimately was adopted and became part of the AIA as enacted.

C. Isolated Floor Statements Do Not Change the Meaning of Enacted Language.

Instead of confronting the full picture of the legislative history outlined above, Petitioner focuses its legislative history argument on a single floor statement from a single legislator made just before the Senate voted on the AIA (which by that time contained both the "on sale" and "otherwise available to the public" provisions). *See* Petr. Br. 27-28. In this floor statement, Senator Kyl offered an aspirational interpretation of the AIA's on-sale bar language, asserting that the language as adopted would restrict the application of the on-sale bar to public sales only, not confidential or private sales. 157 Cong. Rec. S1370 (daily ed. Mar. 8, 2011) (arguing that "[t]he word 'otherwise' makes clear that the preceding clauses describe things that are of the same quality or nature as the final clause—that is, although different categories of prior art are listed, all of them are limited to that which makes the invention 'available to the public.'").

The floor statement even went so far as to say that the "new section 102(a)(1) imposes a public-availability standard on the definition of all prior art enumerated by the bill—an understanding on which the remainder of the bill is predicated." 157 Cong. Rec. S1370. Respectfully, there are two obvious issues with that statement. *First*, it suggests that the result for which Senator Kyl had advocated by proposing his own language *removing* the on-sale bar had, in fact, been brought about by language containing that bar, which he *opposed* in Committee precisely because it

would retain "patent-forfeiture provisions that apply only to non-public prior art." *See supra* at 14, quoting S. Rep. 111-18 at 60. That is an attempt to re-characterize a loss as a win—to make lemonade out of the lemons—when the proposal for replacing the on-sale bar with a publicity standard failed to gain traction. *Second*, the assertion that an individual legislator's preferred reading of the new section 102(a)(1) reflects "an understanding on which the remainder of the bill is predicated" is simply an overreach, and cannot speak for Congress's understanding as a whole. One member's understanding of the bill is just that: That member's understanding. Ample reason exists to doubt that this view of the AIA's meaning is the best interpretation of what Congress meant, particularly because Congress *rejected* the very reforms that were later asserted, in the floor statement, to be found in the AIA. Indeed, that interpretation is fundamentally inconsistent with the rationale Rep. Lofgren clearly articulated in offering her amendment, which was adopted by the Committee and enacted into law. *Markup* 101-102 (statement of Rep. Lofgren). All of this merely confirms what this Court has often recognized, that "floor statements by individual legislators rank among the least illuminating forms of legislative history." *NLRB v. SW Gen., Inc.*, 137 S. Ct. 929, 943 (2017).

Here, the far more illuminating—and indeed, dispositive—account of the legislative history encompasses the entire drafting, debate, and history of the on-sale bar provision of the AIA. The history of alternative bill proposals, the statements and debates about those bills, and the choices Congress ultimately made in adopting the AIA's final language all point in

one direction: that in the AIA, Congress chose to retain the on-sale bar, including its pre-existing meaning as interpreted by this Court.

CONCLUSION

For the foregoing reasons, this Court should affirm the decision of the Federal Circuit.

Respectfully submitted,

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